In the Supreme Court

Appeal from the Court of Appeals
Judges Beckering, Borrello and Kelly

HELEN YONO,

Plaintiff/Appellee,

v.

MICHIGAN DEPARTMENT OF TRANSPORTATION,

Defendant/Appellant.

Supreme Court No150364
Court of Appeals Docket No.308968

Court of Claims No. 11-117-MD

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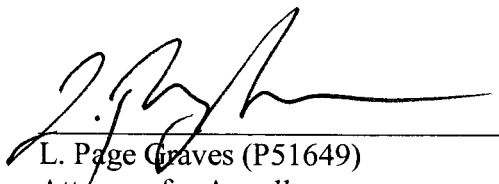
BRIEF ON APPEAL OF APPELLEE

ORAL ARGUMENT REQUESTED

Dated: September 1, 2015.



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CONCURRING STATEMENT OF JURISDICTION

Appellee concurs with Appellant's statement relative to jurisdiction as contemplated by MCR 7.301(A)(2).

COUNTER-STATEMENT OF QUESTION INVOLVED

I. WHETHER *NAWROCKI v MACOMB COUNTY RD COMM*, 463 Mich 143 (2000) IS DISPOSITIVE?

Appellee answers:	"Yes."
Appellant answers:	"No."
The Court of Appeals Answered	"Yes"
The Court of Claims answered	n/a

COUNTER-STATEMENT OF FACTS

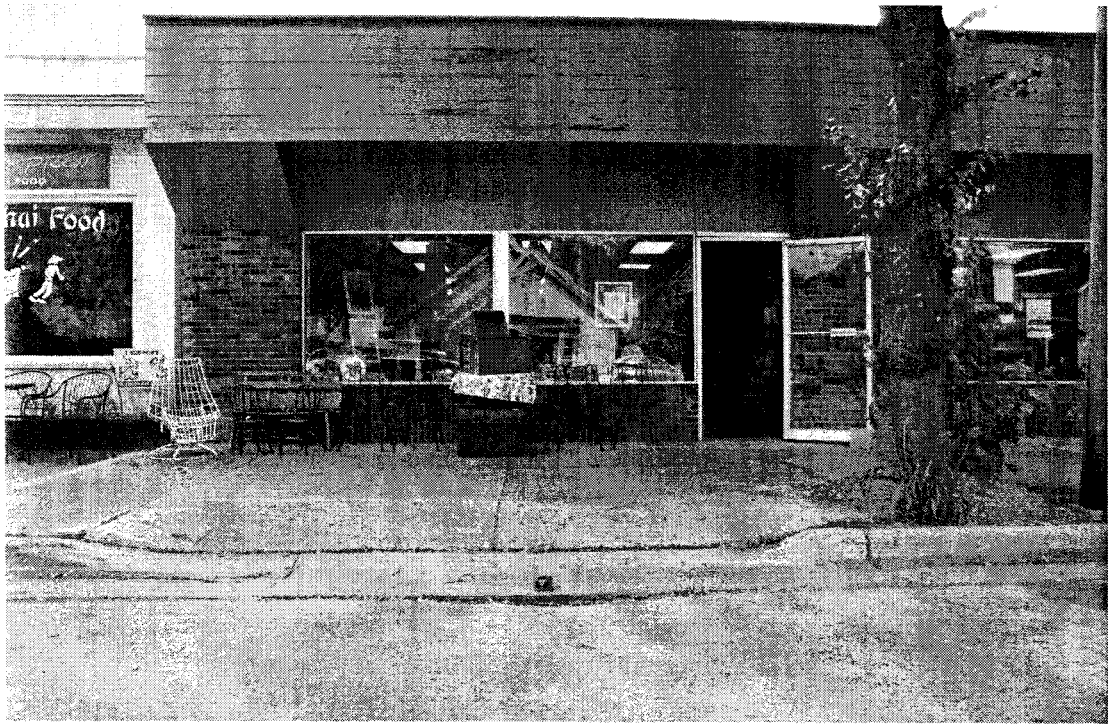
Facts Regarding Helen Yono's Incident

Appellee, Helen Yono states in her Verified Affidavit that she and her daughter visited the Village of Suttons Bay to do some shopping. (*Yono Affidavit*, ¶ 2, App 2b). Mrs. Yono and her daughter parked their car in the parallel parking lane for the east side of M-22. (Id, ¶ 4, App 2b). Mrs. Yono's intended destination was to visit a local art gallery across the street. (Id, ¶ 3, App 2b). She exited her vehicle and then crossed M-22, only to learn that the gallery had closed. (Id, ¶ 5, App 2b). Therefore, Mrs. Yono turned around proceeded back to her parallel parked car. (Id, ¶ 6, App 2b). Mrs. Yono was walking on the roadbed surface and intended to step off of the roadbed surface and onto the sidewalk. (Id, ¶ 7, App 2b-3b). It was at this very juncture that Mrs. Yono's left foot stepped into a defect in the actual roadbed surface of M-22, which was a proximate cause for her to roll her left ankle, lose her balance, fall and sustain a serious fracture to her ankle. (Id, ¶ 7, App 2b-3b; and see App 7b).

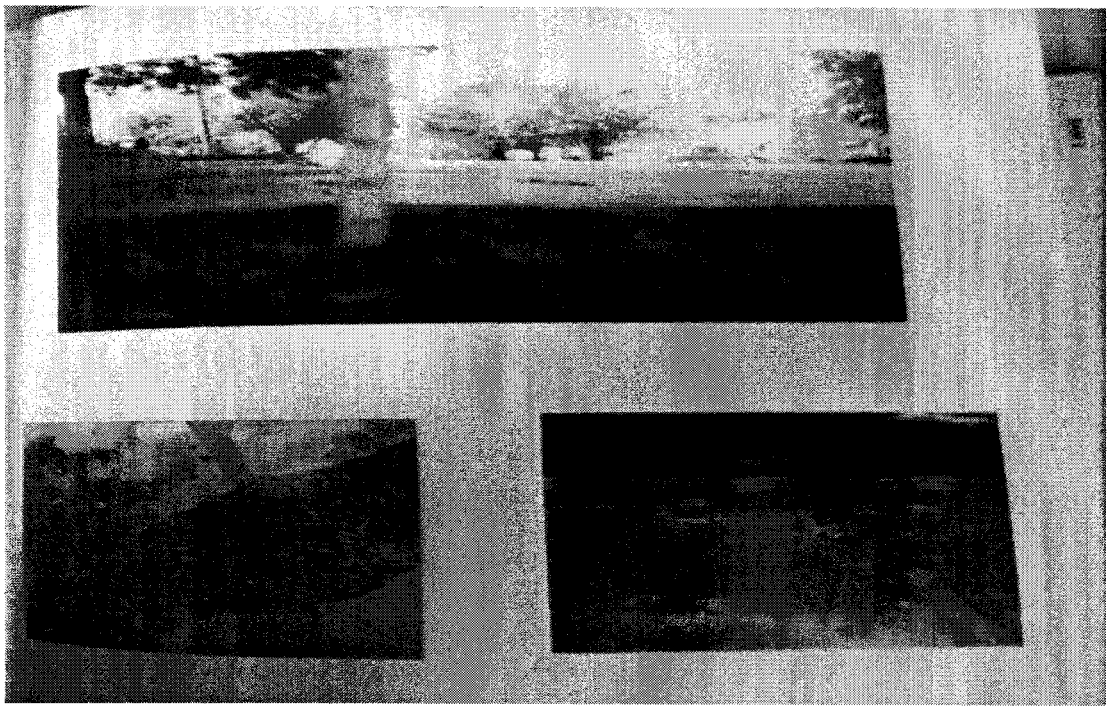
Facts Regarding Rachel Nawrocki's Incident

Mrs. Rachel Nawrocki states in her Verified Affidavit that she and Mr. Nawrocki parallel parked their car on Kelly Road, next to the concrete gutter and curb. (*Nawrocki Affidavit*, ¶ 5, App 5b). Mrs. Nawrocki testified further that after she exited her truck and walked down toward the rear of her parked motor vehicle, she stood on the curb and looked for oncoming traffic. (Id, ¶ 7, App 5b). Mrs. Nawrocki testified that she then stepped off of the curb, about 6 to 12 inches from the curb, right onto the road surface and into the defect that caused her to fall. (Id, ¶ 8, App 5b; and see App 8b). Mrs. Nawrocki testified that she fell toward her parallel parked truck. (Id, ¶ 9, App 5b).

Photos of Locations of Yono's and Nawrocki's Roadbed Surface Defects



Yono location
[App 7b]



Nawrocki location
[App 8b]

CONCURING STATEMENT OF THE STANDARD OF REVIEW

Appellee concurs with Appellant's statement of the basic standard of review.

ARGUMENT

I. A motor vehicle engages in "travel" under MCL 691.1402(1) when it parks in, including pulls into and out of, a lane of a highway designated for parking.

Appellee remains steadfast that *Nawrocki v Macomb Co Rd Comm,* 463 Mich 143 (2000) is dispositive. At page 152, the Court described the substantive facts as follows:

> "On May 28, 1993, plaintiff Rachel Nawrocki was a passenger in a truck driven by her husband. He parked the truck next to the curb on Kelly Road,[1] in Macomb County, and Nawrocki exited from the passenger side onto the grass between the street curb and the sidewalk. She walked the length of the truck and stepped off of the curb onto the paved roadway. Nawrocki allegedly stepped on cracked and broken pavement on the surface of Kelly Road and sustained serious injuries to her right ankle, necessitating several operations."

In *Nawrocki,* the Court held that pedestrians, generally, are a protected class that may claim under § 1402. In this regard, the court reasoned,

> "Moreover, because the state and county road commissions must 'repair and maintain' their respective highways and roads so that they are 'reasonably safe and convenient for public travel,' and because we believe 'public travel' encompasses *both* vehicular and pedestrian travel, the plain language of the highway exception cannot be construed to afford protection only when a dangerous or defective condition 'of the improved portion of the highway designed for vehicular travel' affects *vehicular* travel." Id, p 171 (emphasis in original).

The Court held further that state and county road authorities owe pedestrians a higher duty of care relative to repair and maintenance. The court reasoned that just because a roadway may be in reasonable repair and safe for *vehicular* travel, such does not mean *ipso facto* that it satisfies the standard for *public* travel. In this regard, the court stated at footnote 28,

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[1] Notably, there is nothing in the opinion that suggests that parallel parking was not allowed on Kelly Road. And further, before the trial court Appellee submitted photographic evidence that depicted the actual, indisputable fact that motor vehicles engage in travel on Kelly Road from curb gutter to curb gutter. (App 9b-12b).

> "We acknowledge that repairing and maintaining the improved portion of the highway in a condition reasonably safe and convenient for *public* travel represents a higher duty of care on the part of the government than repairing and maintaining it for *vehicular* travel." Id (emphasis in original).

And finally, consistent with the fourth sentence of § 1402, the court clarified that pedestrian claims qualify provided the *location* of the alleged defect is not within a sidewalk, crosswalk, or any other installation outside of the improved portion the road designed for vehicular travel. In so holding, the court acknowledged the potential for inconsistent results that may occur between a person crossing a roadway at a crosswalk versus a pedestrian stepping out of his/her parallel parked car on the roadway. In this regard, the court explained at footnote 27,

> "We are not unaware of the potential for today's holding to result in outcomes that appear illogical or incongruous. For example, a pedestrian injured by a dangerous or defective condition located within a crosswalk, which is arguably integrated into a roadbed, may not be able to plead in avoidance of governmental immunity, ***while a pedestrian who steps out of a vehicle, onto the paved or unpaved portion of the roadbed used by vehicular traffic, and is injured by a dangerous or defective condition within the roadbed itself, may proceed under the highway exception***. However, such an anomalous result appears compelled by the language of the highway exception." Id, p 172 (emphasis supplied).

With this legal framework established, the court applied its interpretation of § 1402 to the uncontested facts in *Nawrocki,* and held that such implicated the highway exception. Id, p 172. Again, Mrs. Nawrocki's car was parallel parked on the roadway next to the concrete gutter and curb. Appellee remains steadfast, as it did during mini-oral argument before this Court, that *Nawrocki* stands for the proposition that a parallel parking lane was implicated in the Court's analysis that Mrs. Nawrocki's claim fell within the highway exception. Although the court held *Nawrocki* pleaded in avoidance of governmental immunity, it made clear that was not the end of the analysis in the case itself; rather, Mrs. Nawrocki still faced her remaining burden to prove her negligence theory that the road authority failed to repair and maintain the highway. Id. In this regard, this Court

expressly stated at footnote 29,

> "As noted by this Court in *Suttles,* 457 Mich. At 651, n. 10, 578 N.W.2d 295, simply falling within the highway exception is not the end of the analysis. After successfully pleading in avoidance of governmental immunity, a plaintiff still must prove a cause of negligence under traditional negligence principles. . . ." Id.

It is for this very reason that Appellee remains steadfast that *Nawrocki* remains dispositive. There is no other logical interpretation of this Court's express language to suggest anything other than a parallel parking lane implicates the highway exception. If this Court were to accept Appellant's flawed reasoning that *thoroughfares* are the *only* travel lanes actionable under § 1402, to the exclusion of all other regularly used and contemplated travel lanes (e.g., center lanes, passing lanes, exit lanes, entrance lanes and parallel parking lanes), you literally curb *Nawrocki* into parking and walking down the thoroughfares in violation of MCL 257.672. The Court in *Nawrocki* recognized this illogical absurdity in footnote 27, *supra.* Why and where else would a pedestrian "***step[] out of a motor vehicle onto the paved or unpaved portion of the roadbed used by vehicular traffic***" but a designated parking space, parallel or otherwise? Id. Respectfully, the Appellant's repeated reasoning that only thoroughfares are travel lanes is erroneous and must be rejected.

Moreover, in further answering question (1) posed by this Court in its Order Granting MDOT's Application for Leave to App (App 87a), Appellee respectfully submits that the Court of Appeals in *Yono v Dep't of Transp,* 299 Mich App 102 (2012)(*Yono I*)(App 58a) also correctly analyzed this issue in its entirety. In this regard, the Court held that a parallel parking lane is a travel lane within the meaning of "designed for vehicular travel" as contemplated by MCL 691.1402(1). In reaching this conclusion, the Court of Appeals reasoned in pertinent part,

"Under the Department's preferred definition, it would have no duty to repair or maintain a variety of highway improvements that were plainly designed for vehicular travel, but nevertheless not part of that portion of the highway commonly used as the thoroughfare; the Department would have no duty to repair or maintain left-turn lanes, merge lanes, on and off ramps, . . . or even the excess width provided on rural highways to permit drivers to proceed around vehicles that are waiting to turn left. Yet in each case, the lanes, or parts of lanes, are plainly designed for vehicular travel—albeit limited travel. We cannot give MCL 691.1402(1) a contrived meaning that contravenes its plain and ordinary sense. *Echelon Homes, LLC v Carter Lumber,* 472 Mich 192, 196, 694 NW2d 544 (2005). As our Supreme Court explained in *Grimes*, it is the *design* that controls whether the improvement falls within the highway exception. *Grimes*, 475 Mich 90. As such, if the improvement was *designed* for vehicular travel, it does not matter that it is not located with that portion of the highway that is mainly used for travel.

Here, the highway – including that portion designed for parallel parking – is a contiguous whole; the portion where parallel parking is permitted is not physically separated from the center of the highway by a median, driveway, or other barrier. Absent the painted markings, the area for parallel parking would be indistinguishable from the remainder of the highway. It is also evidence that the lanes designated for parking were designed both to permit vehicles to merge from the center lanes to the parking lanes and from the parking lanes to the center lanes.

In addition to this limited – but regular – form of travel, it is also evident from the record that the parallel parking lanes were designed to be used (when unoccupied) to travel around stopped or slow vehicles that are in the center lanes and for turns.[2] Indeed, when there are few or no cars parked in the parallel parking spots, there is nothing to preclude drivers from using the parking lanes as a thoroughfare. See MCL 257.637(1)(b)(making it legal to use such areas as a travel lane when the highway has 'unobstructed pavement not occupied by parked vehicles of sufficient width for 2 or more lines of moving vehicles in each direction. . . .'). Stated another way, M-22, within the Village of Suttons Bay, is an extra wide two-lane or, alternatively, four lane thoroughfare that contains paint markings in that portion of the highway closest to the curb to facilitate the orderly parking of vehicles. The fact that a driver may legally park within this portion of the highway, and thereby obstruct its use as a thoroughfare, does not alter its character; it is still plainly designed for regular, if limited, vehicular travel.

. . . Taken to its logical conclusion, the Department's interpretation must mean that any time parking is permitted on a highway, the Department ceases to be responsible for the repair and maintenance of the area outside that used as a thoroughfare. And, in the case of a common residential street that allows for on-street parking, this means that the Department would have no duty to maintain the street at all because there might be no area that could be used as a contiguous thoroughfare. We cannot agree with such an extreme position." (App 62a-63a).

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[2] Before the trial court, Appellee submitted photographic evidence that depicted the actual, indisputable fact that motor vehicles engage in travel on M-22 within the Village of Suttons Bay from curb gutter to curb gutter. (App 13b–25b).

Appellee adopts the reasoning of the Court of Appeals in *Yono I*, in its entirety relative to the foregoing, because it is sound and consistent with construing the plain and ordinary meaning of a "highway designed for vehicular travel." Unlike a contemplated but only possible, temporal emergent use of a highway shoulder as in *Grimes*, a parallel parking lane is routinely and repeatedly *"used by vehicular traffic"*[3] *"engage[d] in travel"*[4] for the designated purpose of accessing village/city business districts all day; every day. While an individual motorist's use of the parking space may itself be temporary (e.g., a few minutes like Mrs. Yono and Mrs. Nawrocki) or prolonged (e.g., an hour or greater like a patron to a restaurant), it is undeniable that the designated parking space itself is *"used by vehicular traffic"* a multitude of times throughout the course of a day by multiple motor vehicles *"engage[d] in travel"* when they *"park[] in, including pull[] into and out of"*[5] those parking spaces. This undeniable fact contrasts greatly to the limited, emergent use of a highway shoulder which was so critical to the court's reasoning in *Grimes*. If this Court can rationalize its decision in *Grimes* that because travel on a highway shoulder is indiscriminate, limited and temporary for emergency purposes to conclude it is not a "highway designed for vehicular travel," then the exact same comparative rationale by the Court of Appeals in *Yono I* -- illustrating how the parallel parking lanes on M-22 in the Village of Suttons Bay are *"used by vehicular traffic"* that *"engage[] in 'travel' when [they] park[] in, including pull[] into and out f, a lane of a highway designated for parking"*[6] (both in scope and duration) -- supports the proper construction of MCL 691.1402(1) to mean that a parallel parking lane/space is a "highway designed for vehicular travel."

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3 See *Nawrocki,* p 172, *fn* 27 (Emphasis supplied).

4 See Question (1) of this Court's Order Granting MDOT's Application for Leave to Appeal. (App 87a).

5 See *fn* 4.

6 See *fn* 4. It is also an undeniable fact that a protected pedestrian under *Nawrocki* must himself/herself travel (i.e., walk) within the parking lane as well to access the parked vehicle.

II. The Defendant failed to present evidence of the design of the highway at issue which would establish that the plaintiff fell in an area of the highway not designed for vehicular traffic.

The Defendant supported is motion exclusively by submitting its expert's affidavit. (App 36a). In answering question (2) posed by this Court in its Order Granting MDOT's Application for Leave to App (App 87a), Appellee respectfully submits that the Court of Appeals in *Yono v Dep't of Transp (On Remand)*, 306 Mich App 671 (2014)(*Yono II*)(App 71a), did not err when it soundly exposed and correctly concluded that Mr. Niemi's ultimate opinion lacked foundational support and therefore, was invalid and insufficient to meet MDOT's burden to advance its motion. In this regard, the *Yono II* court stated, in pertinent part,

> "He then asserted that everything outside the 22 feet in the center of the highway was either a buffer zone or a parallel parking lane and then concluded, without stating how her reached this conclusion, that parallel parking lanes are not 'designed for vehicular traffic.'" (App 81a).

Mr. Niemi's affidavit says nothing about the actual design of the structure of the road or roadbed itself; rather, Mr. Niemi limits his commentary relative to design to the paint markings on M-22. (App 36a-39a). And his ultimate opinion that the paint markings *ipso facto* demark what constitutes "the improved portion of the highway designed for vehicular travel" are conclusory in nature, without any foundational support. *Maiden v Rozwood*, 461 Mich 109, 130, n 11 (1999). Appellee adopts the reasoning of the Court of Appeals in *Yono II*, in its entirety, relative to the foregoing because Mr. Niemi' affidavit was insufficient to contradict Appellee's allegation that the location where she fell *was* in an area of the highway designed for vehicular travel.

III. Plaintiff produced evidence establishing a question of fact regarding the defendant's entitlement to immunity under MCL 691.1402(1).

The third question (3) posed by this Court in Court in its Order Granting MDOT's Application for Leave to App (App 87a), is rendered moot by the answer reached by *Yono II*, surpa. Arguing in the alternative, however, if a majority of this Court were to conclude that Mr. Niemi's conclusory opinions about what he maintains to be the demarcation of what is vs. what is not "an improved portion of the highway designed for vehicular travel" to be, then intellectual fairness compels a finding that Appellee's expert's affidavit by Mr. Novak (App 41a) must likewise be afforded the exact same courtesies and weight in her favor to preclude summary disposition at this precise stage of the proceedings. Mr. Novak has identified the designed make-up or structure of the roadbed to be a bituminous surface layer. (Id, ¶ 11., sub 1), App 43a). Mr. Novak has identified this designed roadbed structure exists from curb to curb. (Id, ¶ 11., sub 4), 43a-44a). Mr. Novak identified further the undeniable fact that at this portion of M-22 within the Village of Suttons Bay, Michigan, vehicular travel is between the curb gutter edges. (Id., ¶ 11., sub 4), App 44a).[7] And then, of course, Mr. Novak identified that the roadbed surface defect, i.e., the spalled area where Mrs. Yono stumbled and fell, was itself located in that part of the roadbed structure between the gutter edges. (Id, ¶ 11., sub 2), App 43a). Thus, Appellee produced sufficient evidence at this limited stage of the proceedings without the opportunity or benefit of discovery to establish "a question of fact regarding the defendant's entitlement to immunity under MCL 691.1402(1)."[8]

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7 See *fn* 2.
8 See *fn* 4.

IV. Questions of fact on a motion for summary disposition involving governmental immunity applicable to the State of Michigan under MCR 2.116(C)(7) must be resolved by the trial court at a hearing after full discovery.

Respectfully, the forth question (4) posed by posed by this Court in its Order Granting MDOT's Application for Leave to App (App 87a), is unnecessary to this particular appeal because the answer to the question is already set forth in the Court of Claims Act, MCL 600.6401, *et seq*. In causes of action against the State of Michigan pending in the Court of Claims, questions of fact under MCR 2.116(C)(7) are to be resolved by the court at a hearing. Id. The matter before this Court is limited to a claim solely against the State of Michigan. Claims brought solely against the State of Michigan are filed in the Court of Claims, which retains exclusive jurisdiction. MCL 600.6419(1). The Court of Claims is the finder of fact; juries are not empaneled. MCL 600.6443. It is only where multiple party defendants exist which include non-State defendants in addition to the State, may a case proceed in a county circuit court and a jury be impaneled (except for the State claim because the sitting judge decides that claim separately). MCL 600.6421(3).

The purported conflict borne by *Dextrom v Wexford County*, 287 Mich App 406 (2010) and *Kincaid v Cardwell,* 300 Mich App 513 (2013), is derived from the nature of the causes of actions pleaded, who the actual defendants were and the court vested with jurisdiction to hear the matter. The MCR 2.116(C)(7) "determination-by-a-jury-standard" advocated in *Kincaid* dealt with (a) non-State entity defendants; (b) in a case pending in a county circuit court; and (c) dealt with facts relative to whether (1) a statute of limitations arose to bar (2) a medical malpractice claim. Nothing of the sort, whatsoever, is present in our case. *Dextrom* was a governmental immunity case but unlike our case it (a) dealt with a county defendant and not the State of

Michigan; (b) it was pending in the county circuit court which retained jurisdiction; and (c) a jury is permitted, if a party demands a jury, to decide the case. Again, nothing of the sort is present in our case. Respectfully, question (4) by this Court should be answered in a future case where the aforementioned case specific factors are actually present to warrant consideration of the issue.

CONCLUSION AND RELIEF REQUESTED

Nawrocki is dispositive. A parallel parking lane is *"used by vehicular traffic" "engage[d] in travel."* Pursuant to *Nawrocki*, protected pedestrian like Mrs. Nawrocki and Mrs. Yono *"who step[] out of a vehicle, onto the paved . . . portion of the roadbed used by vehicular traffic, and is injured by a dangerous or defective condition within the roadbed itself, may proceed under the highway exception."* *Nawrocki,* p 172, *fn* 27.

WHEREFORE, Appellee respectfully requests that this Honorable Court to grant the following, alternative relief

(1) Affirm the Court of Appeals' opinions in *Yono I* and *Yono II (On Remand)*; or

(2) Affirm the Court of Claims' denial of MDOT's motion, without prejudice, and remand this case back to the Court of Claims for further factual development, as aforesaid, where-after MDOT may refile a revised summary motion based upon a more complete record.

Respectfully submitted,

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Dated: September 1, 2015.

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